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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 214.

THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

vs.

JAMES B. LYON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 27, 1900.

(17,657.)

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1 *Statement.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN E. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

On the 9th day of September, 1899, the complainant filed his bill of complaint against the defendants above named, which bill of complaint is hereto annexed.

A subpœna to appear and answer was thereupon issued and served personally upon the defendants.

The defendants thereafter duly appeared in said cause by John Cunneen as their solicitor, and on the 23d day of September, 1899, filed a plea and demurrer to said bill, which said plea and demurrer were withdrawn and an amended plea and demurrer, which is hereto annexed, filed in lieu thereof.

On the 23d day of September, 1899, said plea and demurrer to the bill came on for argument in conjunction with a motion for an injunction before the Hon. Alfred C. Coxe, judge, at a term of this court held at Utica.

On the 18th of December, 1899, a decision was duly filed overruling the plea and demurrer and granting a preliminary injunction.

2 On the 17th day of January, 1900, an order was duly made overruling said plea and demurrer in accordance with said decision, and an order likewise made continuing the injunction, which orders are hereunto annexed.

On the 17th day of January, 1900, defendants filed their answer to the bill, which answer is hereunto annexed.

The case was thereafter and on the 17th day of January, 1900, brought on for argument on stipulated testimony and affidavits before the Hon. Alfred C. Coxe, judge, at a term of this court held at Albany, and a final decree was then and there made and entered, which final decree is hereunto annexed.

3 *Bill.*

Circuit Court of the United States for the Northern District of New York. In Equity.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants.

To the judges of the circuit court of the United States for the northern district of New York:

James B. Lyon, who is a citizen of the State of New York, and of the United States, brings this his bill in equity, into this court against

the Town of Tonawanda, which is a municipal corporation, duly organized and existing under chapter 147 of the Laws of 1836 of the State of New York, and chapter 569 of the Laws of 1890 as amended by chapter 254 of the Laws of 1891, and by chapters 61, 92 and 252 of the Laws of the State of New York, in Erie county in said State, and John K. Patten, supervisor of said town of Tonawanda, in Erie county in said State, all in said northern district of New York; and thereupon your orator complains and shows, upon information and belief, that your orator is the owner in fee and entitled to the

4 possession of two certain tracts or parcels of land, situated in said town of Tonawanda, county of Erie and State of New York, and known and described on the assessment-roll and advertisement of sale hereinafter mentioned, as parcels Nos. 59 and 62, and hereinafter referred to as parcels Nos. 59 and 62, which said parcel No. 59 is bounded and described as follows:

All that tract or parcel of land, situate in the town of Tonawanda county of Erie and State of New York, and being part of lot 39, township 12 and range 8 of the Holland Land Company survey, and bounded and described as follows: Beginning at the intersection of the southerly line of said lot 39 with the easterly line of Military road, regarded as 5-rod road; thence northerly along the east line of said road 485.76 feet; thence easterly 3,351.55 feet to a point in the easterly line of said lot 521.78 feet northerly from the southeast corner of said lot; thence southerly along the east line of said lot 521.78 feet to the southeast corner of said lot; thence westerly along the south line of said lot 3,466.75 feet to the place of beginning, excepting and reserving therefrom a strip of land 66 feet in width running across said premises, heretofore conveyed to Daniel F. Callahan for a railway by deed recorded in Erie county clerk's office in Liber 678 of Deeds, p. 181.

And which parcel No. 62 is bounded and described as follows:

All that tract or parcel of land, situate in the town of Tonawanda, county of Erie and State of New York, and being part of lot 34, township 12 and range 8 of the Holland Land Company's survey, and bounded as follows: Beginning at the southwest corner of said lot 34, running thence northerly along the east line of lot 39, 521.78 feet; thence easterly 842.48 feet to the center of Delaware street; thence southeasterly along the center of Delaware street about 562.43 feet to the south line of said lot 34; thence westerly along the south line of said lot 34, 1,012.85 feet to the place of beginning.

5 That said Delaware street is now, and for over twenty years last past has been, a public street and highway between the city of Buffalo and the village of Tonawanda in said county of Erie and State of New York, and wholly within the boundaries of said town of Tonawanda, outside of the limits of any city or village corporation.

That during the year 1893, pursuant to an act of the legislature of the State of New York, known as chapter 550 of the Laws of 1893, entitled "An act to authorize the town of Tonawanda, Erie county, to incur an indebtedness for the purpose of grading, gravelling, macadamizing or paving certain highways therein extending from

the village of Tonawanda to the city of Buffalo, and authorizing the town board to make such improvement," the town board of said town of Tonawanda met, ascertained and determined the probable expense of grading and paving said Delaware street, such highway, extending from said village to said city of Buffalo, with vitrified brick and other material, and took such further steps and proceedings after the making of said determination and in accordance with the provisions of said statute, that it ordered the improvement of paving said Delaware street as aforesaid to be made, and incurred an indebtedness therefor to the amount of $232,791.26, and did cause to be issued negotiable bonds of said town for the providing of funds for the expenses of said improvement to a like amount, to wit, said sum of $232,791.26, and sold said bonds, and thereafter and for the purpose of providing for the payment and discharge of said bonded indebtedness, said town board caused a list to be made of all the several lots or parcels of land to be subjected thereupon and bounding on said Delaware street, such highway so improved, describing each parcel and lot thereof and specifying the number of lineal feet of its frontage or boundary on the part of said highway so improved, which said list was duly filed with the town clerk of said town, and such other steps and proceedings taken that said board affirmed the same and it became final and
6 conclusive upon all parties concerned as an assessment and lien superior to all other rights, title or estate therein, upon the several lots or parcels of land respectively specified thereon, to the full amount of such sum of $232,791.26; that in and by said chapter 550 of the Laws of 1893 it was provided that so much of said assessment should be raised from each separate lot or parcel of land fronting on said street and highway so improved as shall be in the same proportion to the entire amount assessed as the number of feet for which the same shall bound or front upon said street and highway so improved, shall be in the aggregate number of feet of frontage or bounds subjected to said assessment by the order of said town board as aforesaid. And it was further provided in and by said statute and act, that a statement should be indorsed by the town clerk upon a correct copy of said list showing when the same became final and conclusive as aforesaid, and said copy and statement should be delivered to the supervisor of the town, and that the town board, or by its direction, the supervisor should thereupon set down upon such statement and against each such lot or parcel of land, its just proportional part of said assessment computed under the rule aforesaid, and file the same with the town clerk, the same to become payable to the supervisor of the town at or within the time specified in order of the town board directing said improvement, and that interest on all such assessment or installments thereof not paid when due and within the time or times mentioned in said order, should become payable from such default at and after the rate of 10 per centum per annum, and such interest should also become a lien upon the land from which the assessment so in default should be payable; and said act and statute also provided that when default should be made in the payment of all or any part

of said assessment for thirty days after it became due, it should be the duty of the supervisor of said town then in office to advertise the lot or parcel of land upon which the same
7 is payable for sale, to sell the same at public auction without credit, to the highest bidder, and if the lands were not redeemed within one year said supervisor should convey to the purchaser at such sale upon payment by him of the amount of his bid, such parcel of land in fee-simple, and that thereupon the town should be bound to its grantee, his successors in title as grantor of said lands, with implied covenants of warranty and seizin, and that said deed of conveyance should briefly recite the proceedings in ordering the improvement and making of such assessment, and should be conclusive evidence that the proceedings were regular and valid. Said act and statute further provided that said supervisor should apply the proceeds of such sale,—first, to his fees and disbursements for making the sale, being the same fees to which a sheriff should be entitled for selling lands on execution, which fees and disbursements were to be a charge on the lands; second,—to apply the remainder of the proceeds of such sale to the payment of the amount of any assessment charged against the lands sold under the provisions of said act, and then to be applied to the payment of said bonded indebtedness so incurred by said town for making said improvement as aforesaid.

And it was also in and by said act, made the duty of said supervisor to personally attend all such sales of real estate, and if the highest sum which had been bid by others for any parcel of land should not be sufficient to pay the assessment with interest and expenses of sale, and he should regard it best for the town to do so, to purchase and take title to said lands in the name of the town, and that thereupon said amount shall be paid from the fund acquired from the sale of said bonds or should be charged against said town.

And your orator further shows upon information and belief, that all of said steps and proceedings provided and required to be taken under and by virtue of said chapter 550 of the Laws of 1893, were taken by said town board and said town clerk under said act, except to advertise said property for sale, and said
8 list and assessment became affirmed and was final as provided in said act, and there was levied, assessed and set down upon the statement and copy of said list, delivered to said supervisor, as the part of said assessment to be raised from said parcels of land Nos. 59 and 62 hereinbefore described, so much of said assessment as was in the same proportion to the entire amount assessed as the number of feet for which said parcels bounded and fronted upon said highway so improved as aforesaid were in the aggregate *the* number of feet and frontage and bounds subjected to said assessment by the order of said town board as aforesaid, and a correct copy of said list and statement having set down upon it and against each of said lots and parcels of lands, its proportional part of said assessment, computed under the rule aforesaid, was delivered to the supervisor of said town and filed with the town clerk. That thereafter nothing further was done in reference thereto until the year

1895, when the legislature of the State of New York enacted a certain statute and act, known as chapter 816 of the Laws of 1895, and entitled "An act enlarging and modifying the powers of town officers in towns within counties having over three hundred thousand inhabitants, and providing for public improvements within such towns, excepting the counties of New York and Kings," by which act it was provided that in each town in the State of New York having a population of 3,000 or upwards, situated in a county having a population of 300,000 or upwards, excluding New York and Kings counties, adjoining a city having a population of over 250,000 inhabitants, the supervisor, town clerk, justice of the peace and commissioner or commissioners of highways, were constituted a board of highway commissioners, and the town board of the town, and were vested with certain powers in said act especially described, reference to which is hereby made for greater certainty, which said act by its terms and limitations was applicable and had reference to and could only apply and have reference to said town of Tonawanda in Erie county in the State of New York.

And in and by said act it was provided and enacted that when any highway or part of highway within any such town had been paved or otherwise permanently improved under any law providing for the assessment of such expense locally, such highway should be subject to control and management of said board, and where any part of the expense of making such improvement, including interest on moneys borrowed, and all other incidental expenses in anywise pertaining to the making of said improvement or money borrowed for that purpose by the town, should remain unpaid at the time said act went into effect, said board should be authorized and empowered, and it should be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, in the manner provided by said statute for making local assessments for raising the expenses of grading and paving of streets, and pursuant to the rules of apportionment and division of the expense therein provided. And that where bonds of the town had been issued and sold to obtain money for the purpose of making such improvement, said assessments should be so made by said board as to become due and collectible at the time and in the amounts necessary for the payment of said bonds as they should become payable, principal and interest.

And said act also provided and enacted that the expense of local improvements for paving or macadamizing any highway should be assessed upon the lands fronting or bounding on both sides of the part of the highway upon which the improvement was made, and that so much of the expenses of the improvement should be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds

to be subjected to the entire assessment, and that the expense of the improvement should include the cost of surveys, estimates, printing, interest on moneys borrowed, and all other expenses or outlays which will be occasioned by reason of the improvements, and that all such assessments should bear interest at and after the rate of 1 per centum thereof for each month or fraction of a month that the same should remain unpaid, after they became due and payable, which interest shall be a lien upon the lot or parcel of land in addition to the principal from the day the same shall become due prior and superior to all other liens, estates or interest therein or thereon, and if any assessment or installment of any assessment should not be paid within one year after the same became due, then the entire assessment should be due forthwith and the supervisor of the town should proceed to advertise and sell the land for the same in the manner provided in said act.

And said act of 1895 contained other provisions similar in form, effect and substance as to the levying of said assessment and as to the sale of lands for unpaid assessments, to those hereinbefore recited and which were contained in and prescribed by chapter 550 of the Laws of 1893, hereinbefore referred to, including the specific provision that when any land was sold and conveyed to the purchaser, the deed of conveyance should be conclusive evidence that the proceedings are regular and valid, and in conformity to law, and that the proceeds of such sale should be applied on the payment of the fees and expenses of making the sale, and the remainder thereof to be applied to the payment of the amount of local assessment charged against the land sold, and the excess, if any, to the payment of all other taxes and assessments due and payable from the land or from the owner thereof, on account thereof, to the town.

11 And your orator further shows upon information and belief, that after the passage of said act, chapter 816 of the Laws of 1895, and after the same went into effect, on or about August 12, 1895, the supervisor, town clerk, justice of the peace, commissioner or commissioners of highways of said town of Tonawanda, constituting a board and acting under and by virtue of the provisions of said act, adopted and filed the assessment-roll and made a certified copy thereof and delivered the same to the defendant Patten who then and there was, and now is, supervisor of said town, duly elected, qualified, and acting, said assessment-roll being for the entire amount of the improvement of grading and paving said Delaware street and highway in 1893, corresponding in terms to the assessment-roll and list and statement made and recorded and filed by the town board of the said town of Tonawanda to raise the amount of such assessment for said improvement under the provisions of said chapter 5 0 of the Laws of 1893, as hereinbefore set forth, and in and by said assessment-roll the lots and parcels of land hereinbefore set forth, known as parcels Nos. 59 and 62, and which are owned by your orator as aforesaid, were assessed upon the basis of frontage in the manner prescribed by said chapter 550 of the Laws of 1893 and said chapter 816 of the Laws of 1895; that is to say, in and by said assessment, so much of the entire expense of the improvement of

grading and paving said Delaware street and highway, including interest on moneys borrowed by the issue and sale of said bonds hereinbefore described, and the expense pertaining to the making of said improvement, or the money borrowed for that purpose, by said town, which remained unpaid, was assessed on each of said lots and parcels of land in the same proportion to the entire expense locally assessed as the number of feet for which said lot or parcel of land bounded and fronted upon that part of the street in which the said improvement had been made, was to the aggregate number of feet of frontage or bounds subjected to the entire assessment, which
12 said assessment upon parcel No. 59, now owned by your orator, was $5,207.16, and on parcel No. 62 was $5,206.26.

And your orator further shows upon information and belief, that nothing has been paid upon said assessment upon each of said parcels of land, Nos. 59 and 62, and certain installments thereof have become due, and as they have not been paid within one year after the same became due, interest thereon at and after the rate of 1 per centum thereof for each month or fraction of a month, has also under the provision of said statute become due, and under the provision of the statute the entire assessment has become due, and the defendant John K. Patten, as supervisor of said town, has proceeded to advertise that he will, on the 14th day of September, 1899, at 10 o'clock in the forenoon of that day, in the corridor on the second floor of the post-office building, in the village of Tonawanda, Erie county, State of New York, expose for sale and sell at public auction to the highest bidder therefor, together with other parcels of land upon which said assessment is claimed to be a lien, the said lots and parcels of land Nos. 59 and 62, belonging to your orator as hereinbefore set forth, and that he, said Patten, such supervisor, claims that the amount of said assessment which will be due on said 14th day of September, 1899, being the amount of the principal of said assessment with interest added as aforesaid, will be on parcel No. 59, the sum of $7,929.30, and on parcel No. 62, the sum of $7,924.74, and unless restrained by the order of this court said defendant Patten, such supervisor, will, in the performance of his duty prescribed by said statutes, sell said parcels of land of your orator to the highest bidder, or purchase them himself in the name of said town, as provided in said act, and execute a deed of conveyance of said parcels of land, which is by the said act declared to be conclusive evidence that the proceedings were regular and valid and done in conformity of law, and said defendant Patten as such supervisor will apply thereby proceeds of any such sale of the parcels of land belonging to
13 your orator, and of the other parcels of land which will be sold on said sale under and by virtue of said assessment, in the manner prescribed by said act, and thereby authorized, to the payment of some or all of said bonds, or the interest accrued thereon, issued by said defendant The Town of Tonawanda, and sold to raise money to pay for said improvement.

And your orator further shows upon information and belief, that all the lands assessed for said improvement of grading and paving said Delaware street, such highway, hereinbefore set forth, were not

and are not benefited equally by the making of said improvement of grading and paving said street; that many of said lots and parcels are unequal in size and depth and of unequal value, and that under the terms and conditions and the rule and basis of levying said assessment, it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, or in any other way, except in the arbitrary manner and method of assessing in such proportion to the entire expense assessed as the number of feet which any lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment, and that thereby, and unless the sale thereof be enjoined and restrained by the decree of this court, the lands and property of your orator hereinbefore mentioned will be taken for public use without just compensation, and your orator will be deprived of his said lands and property without due process of law, contrary to the provisions of the Constitution of the United States.

And your orator further shows, upon information and belief, that he is the owner in fee of certain other lands located in said town of Tonawanda, and which do not front on said Delaware street, such highway, and which have not been and cannot be, under the
14 terms of said statute, locally and specially assessed to pay for said improvement of grading and paving Delaware street, and which said lands are of the value of many thousands of dollars, and upon which your orator has been required to pay, and will hereafter be required to pay, all general taxes and assessments levied by said town of Tonawanda for the purpose of paying any and all indebtedness of said town of Tonawanda, which may become a charge upon the general fund and payable from the general tax levy of said town. That in and by the provisions of said chapter 816 of the Laws of 1895, the said defendant Patten as such supervisor is authorized, in case the highest sum which shall be bid by others for any parcel of land offered for sale be not sufficient to pay the assessment and interest, and the expenses of sale, and he shall regard it best for the town to do so, to purchase said lands, and take a certificate as such purchaser in the name of his town, and thereupon the amount of his bid shall be paid from the town funds, and for the purpose of acquiring moneys to pay the amount bid at any such sale, the town board of said town may authorize the said supervisor to borrow moneys upon the faith and credit of said town, and to issue notes, certificates of indebtedness or bonds for the same, and the proceeds of the sale of the real estate which may be purchased by the town as aforesaid, shall be applied to the payment of such notes and certificates of indebtedness or bonds as may be issued for that purpose, or the money necessary therefor may be raised by general assessment upon the property in the town in the discretion of the said board.

That as your orator is informed and believes, neither your orator

nor many other persons whose lands are to be sold under and by virtue of said assessment on the 14th day of September, 1899, by said supervisor, will bid in the same at said sale, and the highest sum which will be bid by any one for said parcels of land offered for sale will not be sufficient to pay the assessment and interest
15 and expenses of sale, and the said supervisor in order to pay the indebtedness of said town for said improvement and to pay the principal and interest on the bonds issued by said town as hereinbefore set forth to raise the money to pay for said improvement, threatens and intends to and will, unless enjoined and restrained by an order and decree of this court, purchase any and all of said parcels of land to be sold by him on said 14th day of September, 1899, under and by virtue of said assessment and under and by virtue of said acts of the legislature of the State of New York, in the name of the town, and the town board will authorize said supervisor to issue notes, certificates of indebtedness or bonds, and borrow money thereon upon the faith and credit of the town, for the purpose of paying the amount of the several assessments imposed by said assessment-roll upon the lands fronting on said Delaware street, such highway, where said improvement of grading and paving the same has been made, in accordance with the unconstitutional and unlawful provisions of said acts, and in order to repay the said moneys so borrowed, to pay the purchase price of said lands by said supervisor as aforesaid, the said board will levy and raise, by general assessment upon all the property in the town, the money necessary therefor, as provided in said chapter 816 of the Laws of 1895, and thereby, and by reason thereof, both the parcels 59 and 62 of your orator hereinbefore described, and the other lands of your orator in said town of Tonawanda, subject to general taxation, will be assessed unjustly and unequally and without reference or proportion to the benefits received from said improvement of grading and paving said Delaware street, such highway, and in case of non-payment of any such general tax, will be sold to pay the same, and thereby your orator will be deprived of his private property for public use without just compensation and will be deprived of his property without due process of law, in violation of the provisions of the Constitution of the United States, and thereby and by reason of the other acts threatened and in-
16 tended by the said defendants as hereinbefore set forth, your orator will suffer irreparable damage and injury for which he has no adequate remedy at law.

Your orator further shows upon information and belief, as the reason why he has not begun an action to restrain the sale of his said lands before this time, and for the other relief prayed for in this bill of complaint, that various suits and proceedings have been pending in the courts of the State of New York since the levying of said assessment, instituted by your orator and other persons for the purpose of setting aside said assessment-roll on various equitable grounds, amongst others, on the ground that the necessary number of consents of property-owners required by said statutes were not obtained, and from time to time various acts of the legislature of the State of

New York have been sought by your orator and other persons interested in said assessment, including the defendant The Town of Tonawanda itself, of which one of said acts has been passed by said legislature, but vetoed by the governor of the State of New York, which said acts were designed to amend and alter said unconstitutional acts of 1893 and 1895, and to provide an equitable, just and fair method of collecting said assessment, and by reason thereof and by an understanding between the authorities and representatives of said town and your orator, all proceedings in reference to said assessment have been suspended until the result of said suits in the said courts to set aside said assessment could be determined or until the legislature of the State of New York should make some new and further enactment in reference to said assessment. That all of said suits in said State courts have been determined adversely to your orator and the other persons interested therein, and in favor of the validity and regularity of said assessment-roll, and it has been found impossible to obtain from the legislature of the State of New York any relief act in the premises, and the lands of your orator have never been advertised for sale, nor has the supervisor of said
17 town, the defendant Patten, threatened to advertise the same for sale or to take active steps to enforce the collection of said assessment until on or before the 1st day of August, 1899.

Your orator further shows upon information and belief that in none of said actions in the State courts was the allegation made or litigated that the statutes, chapter 550 of the Laws of 1893, and chapter 816 of the Laws of 1895, were unconstitutional and void under the provisions of the Constitution of the United States, and that all of said suits have been discontinued.

Wherefore, your orator prays that the defendants may, if they can, show reason why your orator should not have the relief hereby prayed for, and that they make full disclosure and discovery of all the matters aforesaid and according to the utmost and best of their knowledge, information, and belief, full, true, direct and perfect answer make, to the matters and things heretofore stated and charged, and that the provisions of said chapter 550 of the Laws of the State of New York of 1893, and of chapter 816 of the Laws of the State of New York of 1895, requiring said assessment for said improvement of grading and paving Delaware street, a highway, to be apportioned so that so much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which such lot shall bound or front upon that part of the street in which the improvement has been made, shall be to the aggregate number of feet of frontage or bounds subjected to the entire assessment, and also so much of the other provisions of said acts as are intimately connected with and dependent upon the said provisions of said acts, be adjudged and decreed to be contrary to the provisions of the Constitution of the United States and null and void. And that the defendants, their officers, agents and servants be, and each and every of them, enjoined and restrained from selling the property of your orator, parcels Nos. 59 and 62, for the

purpose of paying said proportion of the assessment levied on
18 said lots or parcels of land, under and by virtue of said acts, and that the defendant Patten as supervisor of the town of Tonawanda be enjoined and restrained from bidding in and purchasing at said sale, advertised to be held by him on the 14th day of September, 1899, the said lots and parcels of land owned by your orator, or any other lots and parcels of land, for the purpose of paying said assessment, and from borrowing any money to pay the purchase price thereof, or issuing any notes, certificates of indebtedness or bonds for the same, or from applying the proceeds of the sale of said lots and parcels of land assessed in said assessment-roll described in the complaint, to the payment of the principal or interest of any bonds issued for the purpose of paying for the improvement of grading and paving Delaware street as set forth in said complaint, and that said defendants be enjoined and restrained from the commission of any of said acts during the pendency of this action, or that your orator may have such other and further relief as the equity of this case may require, or as to your honors may seem meet and proper, together with the costs of this action.

May it please your honors also to grant unto your orator a writ of subpœna directed to the said defendants and each of them, commanding them on a day certain therein to be named, to appear and answer unto this bill of complaint, and to perform such order and decree in the premises as to the court may seem meet and may be required by the principles of equity and good conscience.

ROBERTS, BECKER, MESSER & GROAT,
Solicitors for Complainant, 403 *Main Street, Buffalo, N. Y.*

County of Erie, } ss:
City of Buffalo, }

James B. Lyon, being duly sworn, deposes and says that he is the complainant in this action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES B. LYON.

Subscribed and sworn to before me this 8th day of September, 1899.

L. F. THOMAS,
Commissioner of Deeds in and for Buffalo, N. Y.

Indorsed: Bill of complaint. Filed Sept. 9, 1899. W. S. Doolittle, clerk.

19

Writ of Subpœna.

The President of the United States of America to the Town of Tonawanda and John K. Patten, supervisor of the town of Tonawanda, Erie county, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States for the northern district of New York, in the second circuit, on the first Monday in October, 1899, to answer to a bill of complaint exhibited against you in said court by James B. Lyon, and to do further and receive whatever said court shall have considered in that behalf, and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of Utica, in said northern district, [L. S.] the ninth day of September, one thousand eight hundred and ninety-nine.

W. S. DOOLITTLE, *Clerk.*

ROBERTS, BECKER, MESSER & GROAT,
Solicitors for Complainant.

MEMORANDUM.—The defendant is to enter his appearance in the suit above mentioned, in the clerk's office, at Utica, on or before the day at which the above subpœna is returnable; otherwise the bill may be taken *pro confesso.*

W. S. DOOLITTLE, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

I hereby certify that on the 13 day of September, 1899, at Tonawanda, in my district, I personally served the within writ of subpœna on the within-named defendants by showing the same to John K. Patten with the seal of the court thereon, and at the same time delivering to and leaving with him true copies thereof, being service for Town of Tonawanda, & on John K. Patten, as supervisor.

WM. R. COMPTON,
U. S. Marshal.
WM. H. WATTS, *Deputy.*

Marshal's Fee.

Service	$4.00
Mileage	.90

Indorsed: Equity subpœna. Filed Sept. 20, 1899. W. S. Doolittle, clerk.

20 *Restraining Order.*

Circuit Court of the United States for the Northern District of New York. In Equity.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. PATTEN, as Supervisor of the Town of Tonawanda, Erie County, Defendants.

On the bill in equity of the complainant above named, duly verified September 8, 1899, and filed on the 9th day of September, 1899, in the office of the clerk of this court, together with the affidavit of said complainant, likewise so verified and filed, and on motion of Mr. Tracy C. Becker, of counsel for the complainant, it is

Ordered, that the above-named defendants show cause before me at a term of above-named court to be held at the post-office building in the city of Buffalo, N. Y., on the 19th day of September,
21 1899, at 10 o'clock on that day, or as soon thereafter as counsel can be heard, why they and their officers, agents and servants should not be enjoined and restrained during the pendency of this action, from selling the property and lands of the complainant under a certain assessment for grading and paving Delaware street, in the town of Tonawanda, county of Erie and State of New York, now advertised to take place under the direction of the defendant Patten, on the 14th day of September, 1899, more fully set forth in said bill of complaint herein, and from selling said lots and parcels of land belonging to the complainant or any other lots or parcels of land, and bidding in and purchasing the same at said sale under said assessment for the purpose of paying said assessment, and from borrowing any money to pay the purchase price thereof, or issuing any notes, certificates of indebtedness or bonds for the same, or from applying the proceeds of the sale of any lots and parcels of land assessed in said assessment-roll described in the bill of complaint to the payment of the principal or interest of any bonds issued for the purpose of paying for the improvement of grading and paving said Delaware street, as set forth in the bill of complaint, or why this complainant should not have such other and further relief in the premises as may be just and proper.

It is further ordered, that in the meantime, and until the hearing and determination of said motion, and application for the injunction *pendente lite* under this order to show cause, said defendants are hereby restrained from selling the lots and parcels of land of the complainant on said sale advertised to take place on September 14, 1899, or from doing any other act or thing in reference to the sale of said complainant's lots and parcels of land under said assessment, except to adjourn said sale, so advertised to take place September 14, 1899, and that personal service upon the defendants of a copy of the bill of complaint herein and of the affidavit of the complainant and of the writ of subpœna issued out of this court, and of this

order to show cause if made on or before the 13th day of September, 1899, shall be deemed due and sufficient service thereof.

Utica, September 9, 1899.

(Signed) ALFRED C. COXE, *U. S. J.*

Indorsed: Order to show cause. Filed September 9, 1899. W. S. Doolittle, clerk.

22 United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

The defendants in the above-entitled suit make return to the order heretofore issued in this suit to show cause why an injunction should not be granted as therein more particularly specified and mentioned, enjoining and restraining these defendants from selling the lands of the plaintiff described in the bill of complaint, and levying and collecting and applying the moneys necessary to the payment of the bonds mentioned in the said bill of complaint, and for such cause allege and show:

First. That said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in the said bill, or any of the matters, and the said bill contained not any matter or equity whereon to sustain such writ of injunction as is sought and is prayed for in and by said bill.

Second. That it appears by said bill, as well as by the plea and affidavits on behalf of these defendants herewith presented and filed, that the complainant, and those with whom he is in privity of estate, have been guilty of such laches in bringing or prosecuting this suit and in the other particulars more particularly in the
23 accompanying demurrer specified as that it would be inequitable and unjust to entertain such bill or grant the relief prayed for.

Third. That the alleged illegality of the proceedings of the town board of Tonawanda, mentioned in the bill of complaint, and by reason whereof the complainant demands such injunction, are matters of record which must necessarily appear in any proceeding which may be taken to dispossess the complainant of his said lands.

Fourth. That the complainant has a full, complete and adequate remedy at law.

Wherefore, these defendants pray that the said order to show cause why an injunction should not be granted as aforesaid, be dismissed, and that they be given their costs and disbursements of the application.

JOHN CUNNEEN,
Defendants' Solicitor, No. 85 West Eagle Street, Buffalo, N. Y.

Indorsed: Return to order to show cause.

24 *Notice of Appearance.*

United States Circuit Court for the Northern District of New York.

JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, as Supervisor of said Town, Defendants.	In Equity. No. 6778.

The clerk of this court will please enter my appearance as solicitor for the defendants in the above-entitled cause.

Dated September 18th, 1899.

JOHN CUNNEEN,
Solicitor for Defendants, 85 *West Eagle Street, Buffalo, N. Y.*

Indorsed: Notice of appearance. Filed Oct. 2, 1899. W. S. Doolittle, clerk.

25 *Motion.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants.	In Equity. No. 6778.

Now come the defendants herein and move the court for leave to withdraw from the files of this court the demurrer and plea filed herein on the 23rd day of September, 1899, and to file instead thereof the amended demurrer and plea herewith presented *nunc pro tunc* as of the said 23rd day of September, 1899, and that the clerk of this court be directed to withdraw said demurrer and plea first filed, as aforesaid, and to file the demurrer and plea herewith presented *nunc pro tunc* and as of the 23rd day of September, 1899, in the place and stead of the demurrer and plea first filed, as aforesaid.

The same to be without prejudice to any proceeding which has heretofore been had or taken in this cause.

26 *Order.*

At a term of the circuit court of the United States held in and for the northern district of New York, at Utica, on the 9th day of January, 1900.

Present: Hon. Alfred C. Coxe, judge.

JAMES B. LYON, Complainant.
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

On this day the defendants' motion to be allowed to withdraw from the files of this court the demurrer and plea filed herein on the 23rd day of September, 1899, and to file instead thereof the amended demurrer and plea herewith presented *nunc pro tunc* as of the said 23rd day of September, 1899, and that the clerk of this court be directed to withdraw said demurrer and plea first filed, as aforesaid, and to file the demurrer and plea herewith presented *nunc pro tunc* and as of the 23rd day of September, 1899, in the place and stead of the demurrer and plea first filed, as aforesaid, the same to be without prejudice to any proceeding which has heretofore been had or taken in this case, came to be heard, and upon consideration the court—

Ordered the said motion to be, and the same hereby is, granted.

ALFRED C. COXE, *U. S. J.*

Indorsed: Motion and order to refile demurrer and plea. Filed Jan. 17, 1900. W. S. Doolittle clerk.

27 *Amended Demurrer and Plea.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant.
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

The Town of Tonawanda and John K. Patton, supervisor of said town, defendants jointly and severally by protestation, not confessing or acknowledging all or any of the matters and things in the bill of complaint of James B. Lyon, complainant, to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer showeth:

1st. That the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in the said bill, or any of such matters, and the said bill contains not any matter of equity whereon to sustain such writ of injunction as is sought and is prayed for in and by the said bill.

2nd. That it appears in and by said bill that the complainant has been guilty of such laches in bringing and prosecuting this suit as that it would be inequitable and unjust to entertain said bill or grant the relief prayed for.

3rd. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not appearing on the return of the

notice given pursuant to section 1 of chapter 550 of the Laws of the State of New York of 1893, and objecting to said improvement upon all or any of the grounds or objections thereto, mentioned in the bill of complaint herein.

4th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not appearing on the return day mentioned in the notice, mentioned in section 6 of chapter 550 of the Laws of the State of New York of 1893, and objecting to said assessment upon all or any of the grounds mentioned in the bill of complaint herein.

5th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not having appeared on the return of the notice, mentioned in section 44 of chapter 816 of the Laws of the State of New York of 1895, and made all or any of the objections to said assessment, which are mentioned in the bill of complaint herein.

6th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not having applied to the town board of the town of Tonawanda for relief upon all or any of the grounds upon which the complainant conceives himself to be entitled thereto, against the said assessment because of any of the matters or things in the bill of complaint herein alleged, pursuant to section 53 of chapter 816 of the Laws of the State of New York of 1895.

7th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having taken the proceedings at law to review the assessment complained of, pursuant to section 46 of chapter 816 of the Laws of the State of New York of 1895.

8th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having taken the proceedings at law authorized by chapter 16, title 2, article 7 of the Code of Civil Procedure of the State of New York.

9th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having litigated the validity of chapter 550 of the Laws of the State of New York of 1893 or chapter 816 of the Laws of the State of New York of 1895, or their constitutionality in the suit in the supreme court of the State of New York, which he alleges in his bill he heretofore instituted.

10th. That the complainant has had, and has now, complete, full and adequate remedies at law for all the alleged grievances in the bill of complaint mentioned or referred to.

11th. That the defects and illegalities in the said assessment, mentioned in the bill of complaint, are each and all matters of record which will necessarily appear in any proceeding which may be instituted to dispossess the complainant, or his grantees, of the lands or premises mentioned in the bill of complaint, or of any part of said lands or premises by reason of the said assessment in the bill of complaint mentioned.

12th. That there is a defect of parties complainants or defendants, which appears upon the face of the bill, in that it appears that there are others whose property was assessed in the same proceeding in

which this complainant was assessed, and that the defendants are subject to a multiplicity of suits by all of said persons so assessed, unless such persons are made parties to this suit.

28 That it also appears by the bill that the bonds of the said town have been sold and are held by persons not parties to this suit, and that the rights of said bondholders to payment of said bonds will be affected by any decision of this honorable court which may restrain or enjoin the defendants in this action from taking the proceedings which are prescribed by the laws of the State of New York to obtain the moneys necessary for the payment of said bonds, and for this reason, as well as that the defendants are subject to a multiplicity of suits for the enforcement of the said bonds by the various holders of said bonds, such holders should be made parties to this suit.

13th. That it appears by the face of the bill of complaint that expenses have been incurred and all rights have become vested in the long period of time which has elapsed since the said improvement and assessment were made, and in which the plaintiff and his predecessors in title have neglected to take any of the various proceedings hereinbefore mentioned to correct or annul the said assessment, and during which time the complainant and his predecessors in interest have neglected and omitted to invoke the aid of the court or seek relief in equity against said assessments, and that by reason of the premises it would be inequitable and unjust to grant the relief which the complainant now seeks.

Wherefore, and for divers other good causes of demurrer in the said bill contained, these defendants do demur and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill of complaint;

29 and these defendants, jointly and severally, not waiving their said demurrer, but relying thereon and saving and reserving unto itself and himself all benefits and advantage of exception to the many errors and uncertainties and other imperfections in said bill contained—these defendants for plea thereto saith:

First. They deny that it was impossible for the boards and officers making said assessment to levy and apportion said assessment in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, and allege that the provisions of the statute aforesaid in that regard only required that the said boards and officers should assess the expense of said improvement upon the lots fronting or bounding on both sides of that part of the highway on which the improvement was made, and that the said boards and officers were free to and that it was their duty under the provisions of said statute to assess said expense upon said several lots or parcels of land in proportion to the benefit which each of them derived by the making of said improvement.

Second. And further plead that after the enactment of chapter 550 of the Laws of the State of New York of 1893 in the bill referred to, and on or about the 3rd day of July, 1893, the Columbia Land Company, a corporation organized under and pursuant to the laws

of the State of New York, was the owner in fee of the lands and premises described in the bill of complaint and now belonging to the complainant, whose title is derived as follows, viz:

30 On October 5, 1891, the legal title to the lands on Delaware street described in the complaint was conveyed by one Wire and others to William F. Sheehan in trust for himself and for the plaintiff Lyon and one Defreest, and on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the county clerk of Erie county, N. Y.; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893,

31 said Hulbert sold and conveyed said lands to the Columbia Land Company; that thereafter and on or about the 7th day of September, 1897, in an action in the supreme court, Erie county, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinafter mentioned, were plaintiffs and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on same day and by virtue of said judgment said lands were sold by referee duly appointed in said action of foreclosure and conveyed to said Sheehan, Defreest, and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

That on the said third day of July, 1893, the said Columbia Land Company, then being the owner of said lands, as aforesaid, subject to said mortgages, filed with the town board of the town of Tonawanda a written petition, signed by the said corporation and other owners of property fronting and bounding on that part of the Delaware street or road improved, as mentioned in the bill of complaint, wherein the said signers petitioned the said board to order said part of said road or street to be paved forty (40) feet in width, "pursuant to the provisions of chapter 550 of the Laws of 1893 authorizing the paving of streets in the town of Tonawanda."

32 That thereupon and on said 3rd day of July, 1893, the town board of the town of Tonawanda initiated the proceedings mentioned in said petition, in the form specified in said statute.

That by section 1 of chapter 550 of the Laws of New York of 1893 the town board of the town of Tonawanda were required to give notice and a hearing to all persons interested in said improvement before determining to make the same. Reference is hereby made to said statute for greater certainty as to its form and requirements.

That the said board upon filing said petition and adopting a resolution proposing to make said improvement did give said notice, and designated therein a time and place within said town when the board would meet to hear all persons interested in said improvement who should appear pursuant to said notice or otherwise to make such objections as they might have to such improvement, and that the board aforesaid met at the time and place mentioned in said notice, but that neither the complainant nor any person with whom he is in privity of estate appeared before the said board at the time and place aforesaid or made any of the objections to the said improvement or to the said statute or to its validity which are mentioned in the bill in this suit, or any of said objections whatsoever, and that thereupon the town board determined to make said improvement; that section 4 of the statute last mentioned provided that said determination to make said improvement should have "no force or effect until the consent in writing shall be obtained of the owners of at least one-half of the actual feet frontage of land on each side of any highway ordered as aforesaid to be improved, excepting therefrom the space occupied by highways crossing the same."

33 That afterwards, and on or about the 19th day of July, 1893, the said Columbia Land Company then being the owner in fee of the lands and premises now owned by the complainant in this action as alleged in the bill, the said lands being then subject to the said mortgages, as aforesaid, there was filed with the town board of the town of Tonawanda another writing, wherein it was recited that the town board had "in pursuance of chapter 550 of the Laws of 1893 duly ascertained and determined the expense" of the improvement, and "having duly met and heard all objections offered by any party interested in said improvement, and said board having thereupon and on the 25th day of July, 1893, duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefore, in pursuance of section 4 of said chapter 550 of the Laws of 1893, we, the undersigned, being the owners of more than one-half of the actual feet frontage on each side of said highway to be improved as aforesaid (excepting therefrom the space occupied by highways crossing the same), do hereby consent to

34 said improvement as ordered, hereby ratifying and confirming the action of said town board in the regard mentioned."

Which last-mentioned written instrument so filed as aforesaid with the town board was signed by the said corporation Columbia Land Company by its proper officer, and by numerous other persons and corporations owning lands fronting and bounding on that part of the street or highway aforesaid improved as aforesaid. And that thereupon, and on the 29th day of July, 1893, upon receiving and filing the written consent of property-owners last mentioned, the town board of the town of Tonawanda determined that the consent in writing of the owners of at least one-half of the actual feet frontage of the land on each side of the highway ordered as aforesaid to be improved, excepting therefrom the spaces occupied by the highways crossing the same, had been obtained, and in view thereof, resolved and determined that the improvement be made, and that

bonds of the town of Tonawanda to the amount of $232,600 be issued by said town for the purpose of obtaining money to make said improvement, and that such bonds be sold for that purpose and the moneys used in making said improvement, and that said bonds were so issued and sold and the moneys realized from the sale of said bonds were used in making said improvement petitioned for and consented to by the Columbia Land Company as aforesaid, which improvement and bonds are the same improvement and bonds mentioned in the complainant's bill in this suit.

Thereupon the town board of the town of Tonawanda proceeded in the manner and form specified in said chapter 550 of the Laws of New York of 1893 to assess the moneys necessary to pay said bonds upon the said parcels of land fronting and bounding upon that part of the said street or highway improved as aforesaid.

That pursuant to section 6 of chapter 550 of the Laws of 1893, the said town board caused the list of said lots or parcels of land, mentioned in the said bill, to be made and filed, and that thereupon the notice, prescribed by said section 6 in said statute, was given to all persons interested, that the said board would meet at a time and place which were specified therein, to hear all objections, which should be made to said list or assessment, and that at the time and place specified in and by said notice the said town board did meet to hear and consider such objections, but that neither the said Columbia Land Company, nor the complainant, nor any person in privity of estate, or either of them, appeared or made any objections to the said list. That thereupon the said list was, as alleged in the bill, affirmed and filed, and a copy thereof delivered to the supervisor of the town of Tonawanda, William J. Rogers, who was the predecessor of the defendant Patton, as supervisor of said town; that the said supervisor proceeded to collect said assessments and to apply the same in payment of principal and interest as the same became due, pursuant to the provisions of said bonds, and did threaten to advertise and sell such lands, so assessed as aforesaid, as should be necessary to raise the moneys necessary to pay said bonds, and that the supervisor of said town for the time being continued to make collections of the installments of said assessments until on or about the 29th day of May, 1895, when chapter 816 of the Laws of the State of New York of 1895 was approved by the governor and became of force, and that thereupon the town board of the town of Tonawanda proceeded to reassess the moneys necessary to pay said bonds as aforesaid, pursuant to the direction contained in section 27 of the statute last mentioned.

That the said board caused an assessment-roll to be made and filed, as mentioned in the bill, and pursuant to section 44 of the statute last mentioned the said town board caused notice to be published that at a time and place, which were specified therein, the board would meet and hear and consider any objections which might be made to the said roll, and that at the time and place, which were so specified in said notice, the said board did meet and heard and considered such objections as were made to the said assessment-roll, and did consider and act on all such objections as

were made to the same, and that neither the complainant in this suit, nor any person with whom he is in privity of estate, appeared before the said board at said time and place or made any of the objections mentioned in the bill of complaint, or any objections whatsoever, to the said assessment-roll, or to the said assessment.

That thereupon, and on or about the 12th day of August, 1895, the said board affirmed the said assessment-roll, and that thereupon the said assessment-roll was filed and delivered for collection, being the same assessment-roll mentioned and described in the bill herein.

And that thereupon the supervisor of the town of Tonawanda accepted the said assessment-roll and assumed the collection of said assessments, and that the assessment made under and pursuant to the provisions of chapter 550 of the Laws of 1893, as aforesaid, was abandoned.

That under and pursuant to the provisions of section 46 of chapter 816 of the Laws of 1895, aforesaid, any person interested who shall have appeared before the town board and made his objections at any hearing provided for in that statute, and who shall consider himself aggrieved by the action of the board, may within twenty days thereafter have a writ of certiorari for a review of the decision or action of the board in the supreme court of the State of New York pursuant to the general procedure of that court.

And these defendants allege and show, that neither the complainant in this action, nor any person with whom he is in privity of estate, took any action whatsoever under that part of the statute last mentioned for the review of any of the said decisions of the town board of the town of Tonawanda upon any ground mentioned in the bill herein, or upon any other account whatsoever.

These defendants further allege and show upon information and belief that by article 7, title 2, chapter 16 of the Code of Civil
37 Procedure of the State of New York, the supreme court of the State of New York has and during all the times mentioned herein has had jurisdiction and power in proceedings at law to review every order or determination of the town board of the town of Tonawanda which was made under and pursuant to the provisions of either of said statutes, and these defendants allege that the complainant in this suit did not, nor did any person with whom he is in privity of estate, take any proceedings at law whatsoever under or pursuant to the said article 7, title 2 of chapter 16 of the Code of Civil Procedure, to review any of the orders or determinations which were made by the town board of the town of Tonawanda under or pursuant to the provisions of statutes of 1893 and 1895, or of either of them.

These defendants further show that no action at law, or suit in equity, was commenced in the State, or other courts, for the purpose of setting aside said assessment-roll on any ground whatsoever, or for any other relief or judgment concerning the same until on or about the 5th day of February, 1896, when a suit was instituted by the service of a summons and complaint by Joseph T. Jones, the owner of a parcel of land included in said assessment, in the supreme

court of the State of New York for the purpose of having said assessments adjudged illegal and void and of enjoining the enforcement of the said assessments. That no application for an injunction *pendente lite*, restraining the said supervisor or enjoining him from collecting said assessments, was made in that suit until on or about the 22d day of August, 1896, when notice of an application for such an order was served in the said case of Joseph T. Jones against the said town; that until that motion was noticed as aforesaid no arrangement, agreement or understanding of any name or nature whatsoever was made by the said town, or by any person on its behalf, that any proceedings in reference to said assessment should be suspended until the result of the said suit, or any other suit in said court, or any other court, could be determined, or until the legislature of the State of New York should make some new or further enact-
38 ment in reference to said assessment, but that the said successive supervisors of the town of Tonawanda were endeavoring to collect said assessments, and that the defendant Patton, as such supervisor, was about to advertise the lands, the owners of which had made default in payment of said assessments, including the lands of the plaintiff in this action, for sale to pay said assessments when said motion for said injunction *pendente lite* was noticed in said Jones case aforesaid.

That this complainant did not commence any suit in the supreme court of the State of New York, or elsewhere, to have said assessments declared illegal or void, or to restrain or enjoin the collection of them, or either of them, until on or about the [illegible] day of March, 1899.

That a large number of suits were commenced by owners of property assessed as aforesaid, and persons interested therein, in the supreme court of the State of New York for the purpose of having said assessments adjudged void and of enjoining the enforcement thereof, but that all of said suits have been dismissed by the supreme court of the State of New York, most of them because the plaintiffs in each of said suits were not prepared to proceed to trial when the cases were reached and the trial thereof moved by these defendants.

These defendants further allege and show, that two installments of principal and interest, which became due and payable on said bonds in 1894 and 1895, have been paid; that certain of the owners of property assessed for the improvement as aforesaid have made all payments which have become due on their assessments; that the defendant, The Town of Tonawanda, has raised by general tax the moneys necessary to pay a part of the said two installments of 1894 and 1895, which payments were made before any suit at law or in equity was commenced to have said assessments adjudged void, or to restrain or enjoin the collection of them. That all of said bonds have been sold, and some of them have been resold, and that many of them are owned by savings banks, representing trust
39 funds, and a large number of them are owned by the State of New York, and that said bonds were acquired by the State and by said banks and trust companies before any suit or litigation was instituted or commenced, adjudging or questioning in any

manner the validity of said statutes or of said assessments or of said bonds.

That the complainant and his predecessor in interest and all others interested as owners, and otherwise, in the lands so assessed, have been guilty of laches in not making or asserting any claim that said assessments or proceedings, or the statutes under which they were taken, or the said bonds, were void or illegal, as hereinbefore more fully specified, until investments have been made and proceedings have been taken and interests have become vested as above mentioned in reliance on the validity of said statutes and proceedings, which it would be inequitable and unjust to now disturb, and which proceedings would not have been taken, which investments would not have been made and which rights would not have become vested, had not the Columbia Land Company and others filed the said petition and consent with the town board of the town of Tonawanda and induced it to take the proceedings in making the improvement and the assessment, and issuing and selling the bonds aforesaid.

Third. That there are eighty-four (84) separate parcels of real estate included in said assessment-roll. The owners and persons interested in most of these parcels are residents of the State of New York and within the jurisdiction of this court. The defendants are subject to separate suits by the owners and persons interested in each of said parcels. The owners of said bonds are, so far as known to these defendants, within the State of New York and the jurisdiction of this court. The rights of the owners of these bonds must necessarily be affected by any order or decision which may be made in this suit pursuant to the prayer of the bill, as it is sought to restrain and enjoin the defendants in this action from raising the moneys necessary to pay the said bonds, principal or interest.

40 These defendants are also subject to suits by the different owners of these bonds for their enforcement, and the State of New York, by its comptroller and attorney general, has already threatened to commence proceedings, either by action at law or mandamus, to compel the payment of the interest and of that part of the principal of the bonds now owned by the State which has become due and is payable.

And these defendants allege that the complainant should not be allowed to have or maintain this suit unless the owners of all lands so assessed as aforesaid and the owners of said bonds be made parties to this suit. That all controversies concerning the subject-matter of this suit be determined and adjudged.

And these defendants humbly pray the judgment of this honorable court whether they, or either of them, shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this bill sustained.

JOHN CUNNEEN, JOHN K. PATTON.

Solicitor and of Counsel for Defendants,
85 West Eagle Street, Buffalo, N. Y.

I certify that in my opinion, the foregoing demurrer of the defendants to a part of the bill of complaint of James B. Lyon, complainant, is well founded in law and proper to be filed in the above cause.

JOHN CUNNEEN,
Solicitor and of Counsel for Defendants,
85 West Eagle Street, Buffalo, N. Y.

UNITED STATES OF AMERICA,
Northern District of New York, County of Erie, City of Buffalo, } ss:

John K. Patton, being duly sworn, does depose and say, that he has read the foregoing demurrer to a part of the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein, and doth further say that he is one of the defendants named in the foregoing plea subscribed by him; that he is the chief officer of the defendant, The Town of Tonawanda, to wit, the supervisor thereof; that he has read the foregoing plea and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

JOHN K. PATTON.

Subscribed and sworn to before me, this 30th day of December, 1899.

[SEAL.] WM. W. HAMMOND,
Notary Public.

Indorsed: Amended demurrer and plea. Filed Jan'y 17, 1900, *nunc pro tunc*, as of September 23, 1899. W. S. Doolittle, clerk.

41 *Interlocutory Judgment on Demurrer.*

Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
against
THE TOWN OF TONAWANDA and JOHN K. PATTON, as Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

The issues raised by the demurrer and plea of the defendants above named to the bill of complaint of the above-named complainant having come on to be tried at the September term of this court, held at the city of Buffalo, in the county of Erie, in the district aforesaid, and having been tried upon said pleadings and upon the stipulation between the respective parties, filed in the office of the clerk of this court on the 2nd day of November, 1899, and after hearing Mr. Tracy C. Becker, of counsel for complainant, and Mr. John Cunneen, of counsel for the defendants, this court having rendered and filed its decision overruling said demurrer and plea, it is—

Ordered and adjudged that the demurrer and plea of the defendants to the bill of complaint herein be, and they hereby are, overruled and judgment directed for the complainant for the relief demanded in his bill of complaint, with costs to the complainant, but with leave, however, to the defendants to answer over to
42 the bill of complaint within twenty days after the entry of this order and judgment on payment of costs.

January 17th, 1900.

ALFRED C. COXE, *U. S. J.*

Indorsed: Interlocutory judgment on demurrer. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

43 Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
against
THE TOWN OF TONAWANDA and JOHN K. Patton, as Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

An order to show cause why a preliminary injunction should not be continued during the pendency of this action granted herein on the 9th day of September, 1899, having come on to be heard at the September term of this court, held at the city of Buffalo, in the county of Erie and district aforesaid, upon the bill of complaint herein, filed in the office of the clerk of this court on the 9th day of September, 1899, and upon the writ of subpœna issued thereon, and upon the demurrer and plea of the above-named defendants to the said bill of complaint, and upon the affidavit of James B. Lyon, verified the 8th day of September, 1899, and filed with said bill of complaint on the 9th day of September, 1899, in said clerk's office, and upon the affidavits of John Cunneen, verified September 22nd, 1899, and John K. Patton, verified on said day, and on the return to the order to show cause subscribed by defendants' solicitor, and upon the stipulation of the attorneys for the respective par-
44 ties, filed in said clerk's office on the 2nd day of November, 1899, and having heard Mr. Tracy C. Becker, of counsel for the complainant, and Mr. John Cunneen, of counsel for the defendant-, it is—

Ordered that the injunction order granted on said 9th day of September, 1899, with said order to show cause, restraining the defendants from selling the lots and parcels of land of the complainant, or from doing any other act or thing in reference to the sale of the complainant's lots and parcels of land under the assessment referred to in the bill of complaint in this action be, and the same hereby is, continued during the pendency of this action, except that said sale may be from time to time adjourned until the entry of a final decree herein.

Jan. 17, 1900.

ALFRED C. COXE, *U. S. J.*

Indorsed: Order continuing injunction. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

45 *Answer.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants.	In Equity.	No. 6778.

The defendants, The Town of Tonawanda and John K. Patton, supervisor of said town, jointly and severally, not waiving their demurrer and plea filed herein, but reserving and saving to themselves and each of them all benefit and advantage by reason of them and of each of them, for answer to so much of the bill of complaint in this suit as they are advised it is material or necessary to make answer to, and now and at all times saving to himself and itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained, say:

First. They and each of them admit that the town board of the said town made the improvement and the assessment and issued the bonds, and that the supervisor at the commencement of this suit was taking the proceedings for sale of the lands and premises described in the bill mentioned in the bill, and that each and all of said proceedings were taken in compliance with and in conformity to chapter 550 of the Laws of the State of New York, passed in the year 1893, and with chapter 816 of the Laws of the State of New York, passed in the year 1895, and that over two hundred thousand dollars
46 of the indebtedness mentioned in the bill of complaint, incurred for the purpose of making said improvement, still remains unpaid, and that a large part thereof has become due.

They deny that said act of 1895 prescribed that so much of the expense of the improvement should be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense, locally assessed, as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment.

They also deny "that under the terms and conditions and the rule and basis of levying said assessment it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street," and beg leave to submit the said statute and every part thereof to this honorable court upon the hearing of this case, that proper construction thereof may be given by the court.

They deny that because of the provisions of either of said statutes or for any reason, unless the sale of said lands be enjoined and re

strained by the decree of this court, that the complainant will be deprived of his land and property without due process of law or contrary to the provisions of the Constitution of the United States.

While they admit that the expense of the improvement was assessed so much thereof upon each parcel of land fronting or bounding upon the street as was in the same proportion to the entire expense that the number of feet for which it bounded or fronted on the improvement was to the entire number of feet of frontage or
47 boundaries on each side of that part of the street improved, they deny that said method was an arbitrary manner or method of assessing the same, because in following said method, as aforesaid, they obeyed the mandate of said statute, and on that behalf they allege and aver upon their information and belief that that rule of apportionment was adopted and authorized by the legislature of the State of New York with reference to, after inquiry into, and upon consideration and determination of the benefits which the improvement authorized and made conferred upon the said lands, which inquiry, consideration, and determination appears by the statutes aforesaid and by each of them, and that the legislature of the State of New York, under the constitution of that State, as frequently interpreted by its highest courts, had and now has the power and capacity to prescribe such rule for apportioning expense of local improvement as will in its judgment best result in apportioning to each parcel of land assessed that part of the expense which shall be in proportion to the benefit conferred by the improvement.

And further allege and aver that said determination made by the legislature and evidenced by the said statutes and by each of them bars and precludes the complainant from asserting or claiming that said assessment is not made upon the complainant's lands in proportion to the benefits which they derived by the making of said improvement; and they crave leave to submit the said statutes and each and every part of them to this honorable court, that the same may be properly construed in that regard.

Second. And, to avoid expense and prolixity, the defendants and each of them, as a part of this their answer, here repeat the first, second, and third paragraphs of their pleas filed herein, and crave leave that at all times reference be had to the same for greater certainty as to their contents.

48 All which matters and things these defendants and each of them are ready and willing to aver and maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN CUNNEEN,
Solicitor & of Counsel for Defendants,
85 *West Eagle Street, Buffalo, N. Y.*

UNITED STATES OF AMERICA,
Northern District of New York, County of Albany, } ss:
City of Albany,

John K. Patton, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN K. PATTON.

Subscribed and sworn to before me this 17th day of January, 1900.

JAS. W. BENTLEY,
[L. S.] *Notary Public, Albany Co., N. Y.*

UNITED STATES OF AMERICA,
Northern District of New York, County of Erie, } ss:
City of Buffalo,

James B. Huff, being duly sworn, deposes and says that he is the principal officer of the defendant The Town of Tonawanda, to wit, the supervisor thereof, having recently succeeded the said John K. Patton as such, and having qualified and entered upon the discharge of his duties; that the foregoing answer is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES B. HUFF.

Subscribed and sworn to before me this 16th day of January, 1900.

WM. W. HAMMOND,
[L. S.] *Notary Public.*

Indorsed: Answer. Filed Jan'y 17, 1900. W. S. Doolittle, clerk.

49 *Decree.*

At a term of the United States circuit court held in and for the northern district of New York, at the city and county of Albany, in said district, on the 17th day of January, 1900.

Present: Hon. Alfred C. Coxe, district judge.

Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

This cause came on to be heard at this term and was argued by counsel, Mr. Tracy C. Becker appearing as counsel for the plaintiff

and Mr. John Cunneen as counsel for the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That those parts of the acts of the legislature of the State of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the Laws of the State of New York for the Year 1893 and of chapter 816 of the Laws of the State of New York for the Year 1895, which authorize and require the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of said defendant, The Town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front
50 feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made and which are assessed therefor in and by said assessment bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said provisions of said acts of the legislature of the State of New York and all the acts of said defendant, The Town of said Tonawanda, in levying said assessment in the manner and form aforesaid are, wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States; and it is further—

Ordered, adjudged, and decreed that the acts of the defendant The Town of Tonawanda and of the defendant Patton, as supervisors of said town, in threatening and endeavoring to advertise and sell the plaintiff's said lands under and by virtue of said assessments were, and they are, unlawful and threaten and will work irreparable injury to the plaintiff and his said lands, for which he has no adequate remedy at law; and it is further—

Ordered, adjudged, and decreed that the said defendant, The Town of Tonawanda, and the defendant John K. Patton, as such supervisor of said town, and his successors and their agents, servants, and attorneys be, and they and each and every of them hereby are, forever enjoined and restrained from advertising for sale or selling any of said complainant's said lands under and by virtue of said assessments described in the complaint, and from in any manner collecting or enforcing payment of such assessments against said complainant or his lands or property or threatening or advertising so to collect or enforce the same, and that the said complainant do recover of said defendants, jointly and severally, his costs in this action, amounting to $55.65, and that the complainant have execution therefor accordingly

ALFRED C. COXE, *U. S. J.*

Indorsed: Decree. Filed Jan'y 17, 1900. W. S. Doolittle, clerk.

51 And the costs having been taxed by the clerk at fifty-five dollars and sixty-five cents, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said James B. Lyon recover of said The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county, as adjudged in said final decree, the cost and charges as taxed, the sum of fifty-five dollars and sixty-five cents.

Signed and enrolled, pursuant to the rules and practice of this court, this seventeenth day of January, A. D. 1900, at three o'clock n the afternoon.

W. S. DOOLITTLE, *Clerk.*

Endorsement on cover: In equity. No. 6778. United States circuit court, northern district of New York. James B. Lyon *vs.* The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county. Final record. Roberts, Baker, Messer & Groat, complainant's solicitors. Costs, 855.65; total, 855.65. Filed and entered the 17 day of January, 1900, at 3 p. m. W. S. Doolittle, clerk.

52 *Affidavit of Complainant.*

Circuit Court of the United States for the Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants. } in Equity.

STATE OF NEW YORK, *County of Erie, City of Buffalo,* } *ss:*

James B. Lyon, being duly sworn, says that he resides in the State of New York, in the city and county of Albany, and that he is of full age and a citizen of the United States and of the State of New York; that he is the plaintiff in the above-entitled action, and the owner in fee of the premises described in the complaint; that he has read the complaint herein, verified the same, and he hereby makes said complaint a part of this affidavit; that the sources of deponent's information and belief as to the matters and things alleged in said complaint upon information and belief are the

53 records on file in the office of the town clerk of the defendant The Town of Tonawanda, the printed advertisement of sale of the assessment-roll set forth in the complaint of the parcels of land therein described in the Tonawanda News, a newspaper published in the town of Tonawanda, Erie county, New York, on August 1, 1899, and the record and proceedings in the case in the supreme court of the State of New York of Joseph T. Jones against The Town of Tonawanda and John K. Patten as supervisor of the said town of Tona-

wanda, now on file in the office of the county clerk of Erie county, and statements made to deponent by John Cunneen, Esq., attorney and counselor at law, of Buffalo, N. Y., who acted as counsel for said town and for said supervisor, the defendants in said action of Jones against The Town of Tonawanda, and who is now acting as counsel and adviser to the town board of said town of Tonawanda, and the defendant Patten as supervisor of said town. Deponent further says that the next term of the circuit court of the United States in and for the northern district of New York convenes at the city of Buffalo, N. Y., on the 19th day of September, 1899; that the sale under the unlawful and unconstitutional assessment set forth in the bill of complaint herein on deponent's lands in said town of Tonawanda, is advertised to take place on the 14th day of September, 1899, and that unless said sale is stayed and enjoined until the further order of this court, it is the intention of defendants to proceed with said sale and to do and perform the other acts complained of in said bill of complaint, as they and their counsel have admitted to deponent.

That no other application for any injunction order has been made to any other court or judge and refused.

Wherefore, deponent prays that an order be granted and directed to be served with the writ of subpœna, bill of complaint and this affidavit upon the defendants, granting a temporary injunction and stay of proceedings and said sale, except to adjourn the same,
54 until the 19th day of September, 1899, at the opening of court at Buffalo, N. Y., on that day, or such other time and place as the court may fix, and that said defendants be directed to show cause at said time and place why the said injunction and stay of proceedings on said sale should not be continued during the pendency of this action.

JAMES B. LYON.

Subscribed and sworn to before me, this 8th day of September, 1899.

L. F. THOMAS,
Commissioner of Deeds in and for Buffalo, N. Y.

Indorsed: Affidavit. Filed September 9, 1899. W. S. Doolittle, clerk.

55 *Affidavit of John Cunneen.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda.	In Equity. No. 6778.

UNITED STATES OF AMERICA, *Northern District of New York, County of Erie, City of Buffalo,* } *ss.:*

John Cunneen, being duly sworn, deposes and says, that he is an attorney and counselor at law of the State of New York, and practicing his profession at Buffalo, N. Y.; that he has acted as attorney and counsel for the Town of Tonawanda for several years and has appeared for the said town at hearings before committees of the legislature of said State and before the governor of the said State concerning the proposed bills referred to in the bill of complaint herein, and has been the attorney and counsel of said town in all the suits and actions mentioned in the bill of complaint herein;

That he examined chapter 816 of the Laws of 1895, before the same was submitted to the legislature for enactment, and that he advised the town board, as its counsel, in the proceedings taken to make the assessment referred to in the bill of complaint herein, under the statute last mentioned;

That in the course of his duties aforesaid he has become familiar with all said transactions and personally knows that the matters of fact mentioned in the demurrer and pleas, verified by Honorable John K. Patton, supervisor of the town of Tonawanda, and presented and filed herewith, are true.

JOHN CUNNEEN.

Subscribed and sworn to before me, this 22d day of September, 1899.

[L. S.] WM. W. HAMMOND,
Notary Public.

56 *Affidavit of John K. Patton.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda. } In Equity. No. 6778.

UNITED STATES OF AMERICA,
Northern District of New York, County of Erie, City of Buffalo, } *ss:*

John K. Patton, being duly sworn, does depose and — that he is one of the defendants in the above-entitled suit and is supervisor of the defendant The Town of Tonawanda, and has verified the demurrer and plea herewith filed; that the facts set forth in said demurrer and plea have come to the knowledge of deponent in the course of his duties as such supervisor and by the records of the town aforesaid which have been given in evidence and proven in his presence, and which he has personally examined; that the sale of the real estate of the complainant, described in the bill of complaint herein, has been adjourned for two weeks, to wit, until the 28th day of September, 1899, at ten o'clock in the forenoon; that if the complainant's lands are sold he will have one year within which he may redeem them from such sale.

JOHN K. PATTON.

Subscribed and sworn to before me, this 22d day of September, 1899.

[L. S.] WM. W. HAMMOND,
Notary Public, Commissioner of Deeds in and for the City of Buffalo, N. Y.

Indorsed: Affidavits. Filed September 23, 1899. W. S. Doolittle, clerk.

57 *Stipulation of Facts.*

United States Circuit Court for the Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. PATTON, Supervisor of the Town of Tonawanda, Defendants. } No. 6778.

It is hereby stipulated and conceded by all parties to the above-entitled action, as facts established by competent proof therein at the time of the trial and submission thereof in the above-named court, that on October 5, 1891, the legal title to the lands on Delaware street, described in the complaint, was conveyed by one Wyre and others to William F. Sheehan, in trust for himself and for the

plaintiff Lyon and one Defreest, and that on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the county clerk of Erie county; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893, said Hulbert sold and conveyed said lands to the Columbia Land Company, which said company, while still the owner of said lands and on July 3, 1893, executed and
58 filed with the town board of the defendant The Town of Tonawanda the petition mentioned in defendants' plea in this action, and also on the 29th day of July, 1893, likewise so executed and filed with the said town board the consent set forth in said plea; that thereafter and on or about the 7th day of September, 1897, in an action in the supreme court, Erie county, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinabove mentioned, were plaintiffs, and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on said day and by virtue of said judgment said lands were sold by referee duly appointed in said action of foreclosure and conveyed to said Sheehan, Defreest and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

ROBERTS, BECKER, MESSER & GROAT,
Solicitors for Complainant.

JOHN CUNNEEN, *Solicitor for Defendants.*

Indorsed: Stipulation. Filed November 2, 1899. W. S. Doolittle, clerk.

59 *Decision.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON
vs.
THE TOWN OF TONAWANDA ET AL.

On motion for a preliminary injunction and on demurrer and plea to the bill.

The complainant is a citizen of the State of New York. The defendant The Town of Tonawanda is a municipal corporation of the

county of Erie and State of New York, and the defendant Patten is the supervisor of the said town. The parties are all residents of the northern district of New York, and the jurisdiction of this court is invoked solely upon the theory that a Federal question is involved.

The important allegations of the bill may be stated briefly as follows:

The complainant is the owner of two parcels of land, known as Nos. 59 and 62, situated in the town of Tonawanda and bounding on Delaware street, which is a public highway of said town connecting the village of Tonawanda and the city of Buffalo. In the year 1893 it was decided to pave said street with vitrified brick at an expense of $232,791, and in order to pay the said amount the complainant and other owners of land abutting on the said street
60 were assessed, pursuant to chapter 550 of the Laws of New York for 1893, according to the lineal feet fronting on said highway and without reference to the value of the land or the benefit conferred thereon. All the steps required to be taken under said law were taken except to advertise and sell the property, and thereafter nothing was done until the year 1895, when the legislature passed another act relating to the subject (chap. 816 of the Laws of 1895).

This act creates a town board and provides as follows:

"The said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided."

By section 30 of the act the expenses of local improvements for paving or macadamizing a highway are assessed "upon the lots fronting or bounding on both sides of that part of the highway in which the improvement shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion as the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate of frontage or bounds to be subjected to the entire assessment."

Under this law the complainant's lands were again assessed for the paving of said Delaware street upon the basis of foot
61 frontage, as prescribed by both of said acts, namely, "On each of said lots and parcels of land in the same proportion to the entire expense locally assessed as the number of feet for which said lot or parcel of land bounded and fronted upon that part of the street in which the said improvement had been made was to the aggregate number of feet of frontage or bounds subjected to the entire assessment, which said assessment upon parcel No. 59, now owned by your orator, was $5,207.16 and on parcel No. 62 was $5,206.26."

These amounts, with interest added, are respectively $7,929.30 and $7,924.71, no part of the same having been paid. The defendant Patten, as supervisor, advertised the said lots for sale on the 14th of September, 1899, and will proceed to sell the same at auction unless restrained by injunction.

The lots assessed for the said pavement are of unequal value, size, and depth, are not benefited equally, and "under the terms and conditions and the rule and basis of levying said assessment it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, or in any other way except in the arbitrary manner and method of assessing in such proportion to the entire expense assessed as the number of feet which any lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment, and that thereby and unless the sale thereof be enjoined and re-

62 strained by the decree of this court the lands and property of your orator hereinbefore mentioned will be taken for public use without just compensation and your orator will be deprived of his said lands and property without due process of law, contrary to the provisions of the Constitution of the United States."

The bill further alleges that the said lots will not sell for enough to pay the amounts assessed against them, and that the deficit will be levied in a general tax upon the lands of said town. The complainant owns land in said town other than the two parcels bounding on Delaware street, as aforesaid, which land will thus be subjected to unequal and unjust taxation, and in certain contingencies will be sold to discharge said tax, contrary to the provisions of the Constitution of the United States.

The bill states as a reason for not bringing this action sooner the pendency of various suits and proceedings in the State courts and in the legislature which proved abortive a short time prior to the filing of the bill. The complainant's lands were not advertised for sale and no active steps were taken to collect said assessment until on or about the 1st of August, 1899.

The bill prays for a decree declaring the State acts requiring the assessment for the said pavement to be made by the front-foot rule to be contrary to the provisions of the Constitution of the United States and enjoining the defendants from collecting the said assessment.

The defendants filed a demurrer, with which a plea is united. The grounds of the demurrer are as follows:

63 First. No cause of action in equity is stated in the bill.

Second. The complainant is guilty of laches in not appearing on the return day of the notice given, pursuant to the provisions of the two acts in question, and objecting to the said improvements upon the grounds now stated as invalidating the assessments.

Third. The complainant is guilty of laches in not having applied to the town board for relief and in not having taken proceedings

provided for by the laws of the State to review the assessments and test the constitutionality of the statutes in controversy.

Fourth. The complainant has an adequate remedy at law.

Fifth. There is a defect of parties for the reason that the other abutting land-owners, as well as the owners of the bonds issued for said improvements, should have been made complainants or defendants.

The plea alleges that in 1893 the Columbia Land Company, the then owner of the complainant's lots, petitioned the town board to make the improvements in question and did not object to the same at any stage of the proceedings, but, on the contrary, consented to the improvements and ratified and confirmed the action of the town board in making the same; that when the assessment was made under the statute of 1895 neither the complainant nor those in
privity with him appeared before the board, pursuant to
64 notice, and objected to the assessment-roll, and no action was
taken to review the same, as provided by the laws of New York, and no action was begun to have the same declared illegal until March of the present year; that this delay and inaction upon the part of the complainant and his predecessors amounts to laches which should bar a recovery.

The plea was subsequently modified or amended by a stipulation between counsel stating the facts regarding the complainant's title to the land in question. It thus appears that the Columbia Land Company, at the time the petition for the improvements to Delaware street and the consent to said improvements were filed by said company with the town board, was the owner of said land, subject to three purchase-money mortgages; that these mortgages were, in the autumn of 1897, foreclosed and the land purchased at the foreclosure sale by the complainant and two other parties, who subsequently conveyed their interest to the complainant, who is now the owner and holder of the legal title to said land.

The demurrer admits all of the allegations of the bill to which the demurrer applies, and as issue was not joined upon the plea, the same being set down for argument, the allegations of the plea must also be taken as admitted. The somewhat anomalous character of the defendants' pleading, combining as it does the characteristics of a demurrer, a plea, and an answer, presents the curious spectacle of the defendants admitting certain allegations of the bill to be true and the complainant admitting allegations of the plea to be true which are in irreconcilable conflict with the admitted statements of
the bill. However, this situation applies only to some of the
65 minor features of the controversy, the salient facts being admitted on both sides.

The cause was argued on September 23, 1899, at the Buffalo term, but for the convenience of counsel it was not finally submitted until November 14, 1899, many other causes having in the meantime obtained a preference.

Tracy C. Becker, for the complainant; John Cunneen, for the defendants.

COXE, *J.*:

This controversy is presented to the court upon what is practically an agreed state of facts. The fundamental question is whether or not an assessment, made pursuant to a State law, for grading and paving a highway, which apportions the entire cost of such improvement upon the abutting land according to the front-foot rule, without regard to the size and value of the parcels or the benefits derived from such improvements, is contrary to the fifth and fourteenth amendments to the Constitution of the United States.

If this question has been decided by the courts of the United States it is the duty of this court to follow these decisions, even though the courts of the State may have decided otherwise.

The leading authority is Norwood *v.* Baker, 172 U. S., 269. The facts, of course, differ somewhat from the facts in the case at bar, but that the broad principle there enunciated is applicable cannot be successfully controverted.

The opinion of the court contains an exhaustive review of
66 the judgments of State and national courts and the opinions of eminent text-writers on the subject, and reaches conclusions which may be summarized as follows:

First. Abutting owners may be subjected to special assessments to meet the expenses of opening and improving public highways upon the ground that special and peculiar benefits accrue therefrom, and the legislature has a wide discretion in defining the territory to be deemed specially benefited.

Second. The principle underlying special assessments of this character is that the property is peculiarly benefited and, therefore, the owners do not pay anything in excess of what they receive by reason of the improvement.

Legislative power is limited by this principle. The protection of private property would be seriously impaired were the rule established that the legislature may assess such property by the front foot with the entire cost of an improvement, whether the property is in fact benefited or not.

Third. "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

Any substantial sum taken from the land-owner beyond the exceptional benefit received by him is extortion. Although the
67 legislature may prescribe the rule for the apportionment of benefits, this rule must be one under which it is legally possible that the burden may be distributed justly and equally. While abutting property may be assessed for improvements to a public street in front of it, such assessment must be measured by the special benefits accruing to such abutting property, namely, benefits not shared by the general public. The taxing of private property for profits and advantages which accrue exclusively to the public at large and which confer no benefits upon the property so taxed is taking private property for public use without compensation.

Fourth. Where an assessment is illegal because it rests upon a principle which excludes the consideration of benefits to the land assessed, it is unnecessary for the owner, as a condition of obtaining relief in equity, to pay or tender such a sum as he may concede due upon an assessment properly and legally made.

The case presents considerations of peculiar and extraordinary hardships, but there is nothing to indicate that the court intended to limit the broad principles enunciated to any particular state of facts. At least two of the circuit courts have since the decision applied its doctrine to facts closely approximating the case in hand.

In Fay *v.* Springfield, 94 Fed. Rep., 408, the cost of repaving a street in Springfield, Mo., was assessed, according to the front-foot rule, upon lots fronting on the street without regard to the question whether or not the various parcels of land were benefited to
68 the extent of the assessment. The learned district judge, after a careful review of the entire situation, reached the conclusion that the case before him was ruled by the judgment in Norwood and Baker. The opinion concludes as follows:

"Equality is equity: and the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the State constitution exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (*In re* Canal Street, 11 Wend., 154–156), and he can therefore invoke for his security and protection the Federal Constitution, which prohibits, not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the State the power to 'deny within its jurisdiction the equal protection of the laws.' Following what I conceive to be the ruling of the supreme court in the Village of Norwood case, *supra*, the temporary injunction asked for is granted."

To the same effect is Loeb *v.* Columbia Township, 91 Fed. Rep., 37.

It is argued that the Norwood case is inapplicable for the reason that the Ohio statute provided three alternative methods of assessment, namely: First, in proportion to the benefits; second, according to the value of the property; and, third, by the front-foot rule, while the statute under consideration here provides only for the assessment upon the lots fronting or bounding upon both sides of the highway. It is said that the village authorities, having adopted the front-foot rule under the Ohio statute, necessarily excluded the consideration of benefits received, while in the case at bar the statute permitted the board to consider the benefits to the land, and that they may have done so, and thereafter have fixed upon the front-foot rule as the most equitable method of apportioning these benefits.

It is thought that this construction is contrary to the plain
69 provisions of the law. Section 30 of the act of 1895 makes no reference whatever to any mode of taxation based upon the value of the property or which takes into consideration the benefits conferred. There is no affirmative authorization for proceeding

except by the front-foot rule. The section begins with the following provision:

"The expenses of local improvements shall be assessed as follows: For building or repairing sidewalks, by frontage assessment upon the lots in front of which the walk shall be constructed or repaired."

It is argued that because the word frontage is here used the elaborate provision for the apportionment of "frontage assessments" found at the end of the section applies only to sidewalks. Such a construction violates several well-known canons of statutory interpretation. It eviscerates the section, leaving it ambiguous, if not inoperative, as to the more important subjects treated by it. The section provides that the expenses for paving a highway shall be assessed upon the lots fronting or bounding thereon and then declares that frontage assessments shall be apportioned by the front-foot rule. An assessment upon lots fronting on a highway is "a frontage assessment" to the same extent as if the words quoted had been used; that the front-foot rule does not relate to sidewalks only is manifest from the language of the last clause of the section. The language requiring the assessments to be levied in proportion as the number of feet "bound or front" upon the street probably refers to the local improvements mentioned in all the preceding clauses; it certainly refers to "lots fronting or bounding" on the street, as described in the clause which immediately precedes it. If the legislature had substituted the words "assessments upon lots fronting on the
70 street" for "frontage assessments," so that the sentence in question would read, "Assessments upon lots fronting on the street shall be apportioned as follows," there could be no possible pretence for the contention of the defendants, and yet it is thought that this was unquestionably what the lawmakers meant. Any other construction leaves the section without any definite and certain provision regarding assessments for the most important improvements sanctioned by the law. An interpretation which renders an act meaningless or obscure should always be avoided. That the construction here approved was recognized by all as the proper one prior to the rise of this controversy is demonstrated by the fact that the board, acting upon the advice of counsel learned in the law and familiar with all the facts, assessed the complainant's lots according to the front-foot rule.

We have, then, the fact, alleged in the bill, admitted by the demurrer, conceded in the brief, that the complainant's land was assessed by the front-foot rule under a statute which certainly authorized, if it did not command, this mode of apportionment.

Why, then, does not the following language of Norwood and Baker apply?

"It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement without taking special benefits into account, and that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or

not to the extent of such cost. * * * Taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

71 The New York law, in failing to provide any method for ascertaining and apportioning benefits, resembles the Missouri statute, considered in the Fay case, *supra*, more closely than the Ohio statute. Of the Missouri law the court says:

"As persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment no method whatever is provided therefor, and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments as a basis for the apportionment was not contemplated or provided for."

But it is argued that, though the rule adopted may lead to equitable results, there is nothing to show that this has been the case here. The frontage assessment may have been the most equitable and just that could have been adopted, and unless the complainant can show injury he cannot maintain his bill. It is contended that when the legislature adopts a method of apportionment, as in the statute at bar, it decides the proportion in which the land will be benefited.

Assuming that since the decisions of the United States courts these questions are open for discussion, and that the court may say that the arbitrary front-foot rule is a rule under which special benefits are not necessarily and uniformly excluded, it is thought that the arguments are not availing at the present time.

It should be remembered that this question is presented upon demurrer, all the allegations of fact in the bill being admitted.

It is true that these allegations are not as specific upon the question now under consideration as they might be, but the bill unquestionably avers that the abutting lots were not benefited

72 equally; that they were of unequal value, size, and depth, and that they were unjustly and unequally assessed. Under this allegation the complainant will be permitted to show the facts as they actually exist.

For instance, he might be able to prove that the Delaware Street pavement was an unquestioned benefit to the village of Tonawanda, the city of Buffalo, and to the terminal property, but a distinct disadvantage to the intervening land. It might be shown that the grade was so raised or lowered in front of the complainant's lots as to render them practically worthless for residential or business purposes. It might be shown that some of the property on the line is improved and of great value and other parcels are swamp land, not even available for farming; that some of the lots are five thousand feet deep and others five hundred feet deep; that some are worth five thousand dollars and others of equal frontage are worth but five hundred dollars.

Again, the complainant might prove that the grading and paving of the street so interfered with proper drainage that, whereas his land prior thereto had yielded him large profits, it is now under water and valueless.

These conditions are, of course, conjectural and are suggested to illustrate the impossibility of determining upon demurrer that benefits to the assessed property were considered under the rule of apportionment adopted by the board.

If the complainant should show that the building of the highway left his property twenty feet below the surface of the street, it
73 could hardly be contended that as to him the rule "was the most just and equitable that could be adopted."

On the other hand, should it appear that the front-foot rule properly and justly distributed the burden upon the property benefited, the doctrine of the authorities cited by defendants would be applicable.

Counsel for the defendants has shown great diligence in collecting the adjudged cases, and that many of them sustain the propositions for which he contends may well be conceded. No more careful and painstaking exposition of the law from his point of view could be presented. All of these authorities are, however, prior to the cases cited at the beginning of this decision and must yield to the paramount authority. Reluctant as this court is to interfere with proceedings instituted under State authority, there is no alternative when those proceedings are prohibited by a tribunal before whose judgments all must bow. After an earnest endeavor to give full weight to all that has been urged in favor of the defendants the court is unable to distinguish upon principle the case at bar from the Norwood case and the circuit court cases which have applied the doctrine there enunciated.

It is insisted by the defendants that the long delay in seeking redress amounts to inexcusable laches, which should prevent any relief from being granted. As the act under which the present assessment was levied was not passed until May, 1895, it is unnecessary in considering this question to discuss occurrences prior to that date. This proposition seems too plain for debate, and is, it would seem, conceded by the defendants.

74 As to the assessment in dispute, the act of 1895 superceded the act of 1893.

"It should be borne in mind," says the defendants' brief, "that the assessment made under the act of 1893 has been abandoned; that the assessment which defendants are enforcing is the one made under the act of 1895, * * * so that we are only concerned about the validity of the assessment made under the power last mentioned."

The complainant could not, therefore, have attacked the former assessment. The defendants made that course not only unnecessary, but impossible; they abandoned the assessment, leaving the complainant with no grievance and no cause of action. But four years are, then, to be accounted for. The bill alleges that the reason this action was not sooner commenced was:

First. The pendency in the State court of actions to set aside the assessment.

Second. Efforts at various times to procure the assistance of the legislature.

Third. An agreement between the land-owners and the town authorities to suspend affirmative action on both sides until the decision of the court was announced or until the legislature had passed an act providing for a fair and just apportionment.

The case of Jones *vs.* these defendants, 158 New York, 438, was not decided by the court of appeals until March 21, 1899. No active steps were ever taken to collect the assessment until about the 1st of August, 1899, and within six weeks thereafter this action was
75 commenced. No laches can be predicated of these admitted facts. The complainant had a right to rely upon the pendency of other proceedings and the understanding on all hands to await their determination. Indeed it may well be doubted whether, in any event, he was called upon to act until his property was actually threatened. Had he not a right to assume that the defendants would not attempt to collect an illegal tax and rest upon this assumption until some overt act was committed?

If the complainant had begun this suit while all parties were endeavoring to reach a just apportionment he would probably have been denounced as an impertinent and perniciously active interloper, who had failed to keep faith with the defendants and who had complicated the situation by an unnecessary and vexatious litigation. One who fires on his adversary during the existence of an armistice should not be encouraged, but denounced as an outlaw.

The most cogent argument advanced by the defendants in the judgment of the court, is based upon the alleged estoppel growing out of the acts of commission and omission of the former owner of the complainant's land. There can be no doubt that the Columbia Land Company petitioned for, consented to, and acquiesced in the improvement as originally projected. It is contended that the complainant is bound by these acts, and is therefore remediless.

The answers are:

First. Even though the complainant was in privity with the Columbia Company, an assent to be assessed under the law
76 of 1893 was not an assent under the law of 1895, with all its changed conditions and additional burdens.

Second. A petition for an improvement is not a petition for an illegal assessment.

In all the company's acts there is nothing inconsistent with the theory that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation or to the taking of its property for public use without compensation.

Third. As the law under which the proceedings were instituted was unconstitutional and void, the consents given thereunder were inoperative and bound no one.

That in the circumstances here, where neither the Columbia Company nor the complainant has received any advantage or retained any benefit under the law, the right to assert its unconstitutionality was not and could not be waived.

Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendant- relied upon the company's

acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia Company had never existed. No injury to the defendants or benefit to the complainant followed from these acts.

Fifth. The complainant is not in privity with the Columbia Company. His title is derived from prior purchase-money mort-
77 gages, and since he obtained title he has maintained a position of open and avowed hostility to what he insists is an illegal tax.

Equity recognizes and tolerates estoppels, but does not encourage them: she admits them into her domains, but they are usually regarded as undesirable aliens, having little in common with the other members of her family.

Before saying to a suitor that his rights have been destroyed by his own act a court of equity should be certain of the rectitude of its position.

The general nature of an estoppel is well stated as follows:

"An estoppel may be defined in a general sense to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which has, by an act *in pais*, induced another to believe and act upon to his prejudice. * * * Estoppels must be certain to every intent and are not to be taken by argument or reference."

(Am. & E. Enc. of Law, 2d ed., vol. 11, 387.)

It may well be doubted whether the complainant was in privity with the Columbia Land Company. His title was derived from a conveyance prior to the deed to the company. The company held only the equity of redemption and could do nothing to impair the value of a prior mortgage. The complainant's title did not come from or through the company: it came from a source which was paramount, prior, and in a sense hostile to the company's title.

Mr. Justice Story clearly states the general rule of privity in Carver *v.* Jackson, 4 Peters, 1, as follows:

"The recital of one deed of title in another binds the parties
78 and those who claim under them. Technically speaking, it operates as an estoppel and binds parties and privies, privies in blood, privies in estate, and privies in law, but it does not bind mere strangers or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title or persons claiming from the parties by title anterior to the date of the reciting deed."

See also Oliver *v.* Piatt, 3 How., 333, 412, and Corning *v.* Troy Nail Factory, 40 N. Y., 191, 203.

Assuming, however, that the Columbia Company was in privity with the complainant, it is thought that the latter is not estopped from maintaining this suit.

A similar claim of estoppel was advanced in Sharp's case, 56 N. Y., 257. In overruling the claim Judge Grover made use of lan-

guage which, in principle, is directly applicable to the case in hand. He says:

"It is insisted by the counsel for the appellant that the petitioner is estopped from denying the power of the board to do the work by having signed the petition asking to have it done. Upon principle there is no basis for such an estoppel. All that the petitioner did was as a property-owner to petition the board to proceed and repave the street in the mode desired by him, as he lawfully might. He made no representation to the board that the signers constituted a majority of the owners of property fronting on the street or anything to that effect. He had a right to rely upon the performance of its duty by the board, which was upon the presentation of the petition and before basing any action thereon to ascertain whether the numbers who had signed were sufficient to confer jurisdiction to act. Signing or presenting it was no assertion of its sufficiency in this respect. It contained a representation that the petitioner owned property fronting upon the street, and that he desired, in case a sufficient number of like owners united therein to constitute a majority, that the street should be paved with Nicholson pavement. A party is estopped only when by his declarations or conduct he has induced another to act upon the supposed existence of a fact and would be in consequence injured by showing its non-existence. There is no such element in this case. The consequence of the doctrine contended for would be to make the assessment valid upon such owners as had signed the petition, while invalid as to all others, leaving the former not only to pay their just portion of the expense, but to contribute as tax-payers to the payment of the portions which should have been imposed upon those who had not signed. The principle contended for, if generally applied, would involve most mischievous consequences. One signing a petition to the commissioners
79 of highways to lay out a road would be estopped from showing that the proceedings based thereon were not legal, and hence the road might be adjudged a legal highway as to him, while it was not as to the public generally. The cases calling for its application, it is readily seen, would be quite numerous, and the consequences would create much confusion and hardship."

Upon this branch of the controversy the proposition may be broadly stated as follows:

The property of A, who obtains title through the foreclosure of a purchase-money mortgage, is unlawfully assessed for a local improvement in the sum of $16,000 under an unconstitutional law. When the improvement was first proposed B held title to the property, acquired subsequently to the date of the mortgage and subject to it. B petitioned for and assented to the improvement under a prior statute, which two years after its passage was superceded, the assessment thereunder being abandoned. By the foreclosure of the mortgage B's title was extinguished, A taking no title from B. In these circumstances is A estopped from contesting the validity of an assessment made under a subsequent statute? The court is of the opinion that this question must be answered in the negative.

This is one of that class of cases where the granting of preliminary

relief is inseparably linked with the final decree. The latter depends upon the former for its efficacy. Without an injunction a judgment in favor of the complainant would be a mere *brutum fulmen*. His property once sold, he has no adequate remedy in law or equity, and even should he finally succeed, it will require years of litigation before his rights are finally restored. He pre-
80 sents a cause of action which, even from the defendants' point of view, is founded upon propositions which are entitled to the most grave and serious consideration.

Manifestly it is the duty of the court not to permit the defendants at the outset to accomplish the injury which it is the object of the suit to prevent. The inconvenience to the defendants by the delay is not to be compared to the irreparable injury to the complainant if his property is taken without due process of law. If the defendants finally succeed, the sale will be made with the full assurance that the purchaser will receive a valid title. Even if the court entertained a doubt upon the main propositions involved it would still be its duty to maintain the present status until these important questions are finally answered after a trial upon the facts.

Whether the difficulty can be cured by remedial legislation it is not for this court to determine. Both counsel seem to agree that it can be and it is clear that an act providing for a just and equitable reassessment based upon benefits received could not be attacked upon the present lines.

The right of the legislature to intervene seems to be recognized by the court of appeals in the Jones case, and in the Norwood case Mr. Justice Harlan says, at page 293:

"It should be observed that the decree (of the circuit court) did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it to make a new assessment upon the plaintiff's abut-
81 ting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accrusing to the property. * * * The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion."

(See also Spencer *v.* Merchant, 100 N. Y., 585.)

It follows that the demurrer and plea must be overruled, the defendant to answer within twenty days.

The motion for a preliminary injunction is granted, the complainant to give a bond in the usual form for an amount that will be fixed upon the settlement of the order.

Indorsed: Decision, Coxe, J. Filed December 18, 1899. W. S. Doolittle.

82 *Bond.*

Know all men by these presents that we, The Town of Tonawanda, in Erie county, and John K. Patton, supervisor of the town of Tonawanda, as principals, and the United States Fidelity & Guaranty Company, a surety corporation, having an office and usual place of business at No. 140 Broadway, in the city of New York, as surety, are held and firmly bound unto James B. Lyon in the full and just sum of two hundred and fifty dollars ($250.00), to be paid to the said Lyon, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventeenth day of January, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the United States circuit court for the northern district of New York, in a suit pending in said court between James B. Lyon, complainant, and The Town of Tonawanda, in Erie county, and John K. Patton, supervisor of the town of Tonawanda, defendants, a final decree was rendered against the said defendants, and the said defendants having obtained the allowance of an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Lyon, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said defendants shall prosecute said appeal to effect and answer all
83 costs and if they make good their plea, then the above obligation to be void; else to remain in full force and virtue.

TOWN OF TONAWANDA, N. Y.,
By JAMES B. HUFF, *Supervisor.* [L. S.]
JOHN K. PATTON.
[L. S.] THE UNITED STATES FIDELITY & GUARANTY COMPANY.
VINCENT D. RYAN, *Attorney-in-fact.*

Approved January 17th, 1900.

——— ———.

[2½ cents of revenue stamps, cancelled.]

[Endorsed:] Copies of bond.

84 STATE OF NEW YORK,)
County of Erie, City of Buffalo,) *ss.:*

On this fifteenth day of January, 1900, before me personally came Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business in the State of New York, to me known, who,

being by me duly sworn, did depose and say that he resided in the city of Buffalo; that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed *in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed* to the said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto as attorney-in-fact of said company by like order; that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893 and the acts amendatory thereof and supplementary thereto.

AUSTIN F. RYAN,
Notary Public, Erie Co.

[L. S.]

85 At a special meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company, in the city of Baltimore, State of Maryland, on the 19th day of January, 1899, at which was present a quorum of said directors duly authorized to act in the premises, on motion, it was unanimously

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, James Ryan, Vincent D. Ryan, and Austin F. Ryan, the attorneys-in-fact of the United States Fidelity and Guaranty Company, for the county of Erie, in the State of New York, be, and each of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for and in behalf of this company, and to attach thereto the seal of the company, the same to be attested by either one of said attorneys-in-fact named as occasion may require.

CITY OF BUFFALO, } ss.:
County of Erie, State of New York, }

I, Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at Buffalo, N. Y., this 15th day of January, 1900.

[L. S.]

VINCENT D. RYAN,
Attorney-in-fact.

86 UNITED STATES OF AMERICA, } ss.:
Northern District of New York, County of Erie, City of Buffalo, }

On this 16th day of January, 1900, before me, the subscriber, personally appeared James B. Huff, to me known and known to me

to be the same person described in and who executed the foregoing bond, and he duly acknowledged to me that he executed the same.

WM. W. HAMMOND,
Notary Public. [L. S.]

UNITED STATES OF AMERICA,
Northern District of New York, County of Albany, City of Albany, } *ss:*

On this 17th day of January, 1900, before me, the subscriber, personally appeared John K. Patton, to me known and known to me to be the same person described in and who executed the foregoing bond, and he duly acknowledged to me that he executed the same.

JAS. W. BENTLEY,
[L. S.] *Notary Public, Albany Co., N. Y.*

Indorsed: Bond. Approved. A. C. Coxe, U. S. J. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

87 *Assignment of Errors.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
vs.
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

Now come the defendants and file the following assignment of errors, upon which they and each of them will rely upon their and each of their appeal from the final decree made by this honorable court in the above-entitled cause:

1st. The court erred in holding and deciding that the complainant is not estopped from maintaining this suit by the affirmative acts of his predecessor in title in petitioning for and consenting to the making of the improvement, and by his own acquiescence and the acquiescence of the owner of the mortgage, on the foreclosure of which he derived title, in the making of said improvement, whereas the court should have held that the complainant was and is estopped from maintaining this suit by reason of the said affirmative acts and acquiescence aforementioned.

2nd. The court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a court of equity to relief against the defendants or either of them touching the matters contained in the said bill, whereas the court should have held and decided the contrary thereof.

3rd. The court erred in holding and deciding that the bill contained matter of equity whereon to sustain the writ of injunc-
88 tion sought, prayed for, and awarded, whereas the court should have held and decided that the bill contained not any

matter of equity whereon to sustain such writ of injunction as is sought, prayed for, and is granted by the decree herein.

4th. The court erred in holding and deciding that the complainant was not guilty of laches which should bar and preclude his right to the relief prayed for or to the injunction granted herein, whereas for the reasons specified and enumerated in the demurrer and plea filed herein and to which, for the purpose of avoiding expense and prolixity, the defendants crave leave that at all times reference be had for greater certainty as to their contents, the court should have held that the complainant was barred by laches and acquiescence from having or maintaining the relief prayed for and granted by the decree herein.

5th. The court erred in holding and deciding that the complainant was entitled to the relief prayed for because of the invalidity of the statute under which the assessment was levied, whereas the court should have held and decided that the invalidity of said statute was and is a matter of record appearing upon the face thereof, and that therefore a court of equity would not interpose to restrain or enjoin proceedings taken under claim of authority of such invalid statute.

6th. The court erred in holding and deciding that the complainant was entitled to relief in equity, whereas the court should have held and decided that the complainant has a full, adequate, and complete remedy at law.

7th. The court erred in holding that the statute under which the assessment was levied required that the assessment should be made arbitrarily and without reference to the benefits which the assessment conferred upon the complainant's lands, whereas the
89 court should have held and decided that the statute authorized and empowered the town board of the town of Tonawanda to levy and make said assessment upon the property described in the bill of complaint in proportion to and upon the basis of the amount of benefit which the making of the improvement conferred upon the said lands and premises.

8th. The court erred in holding and deciding that the mere apportionment of the assessment in proportion to the relative frontage of the several parcels of land upon the improvement established that it was made arbitrarily and without reference to benefits conferred upon the land by the improvement, whereas the court should have held and decided, in the absence of evidence to the contrary, that the town board adopted this rule of apportionment as a result of a prior determination that each parcel of land was benefited by the improvement in proportion to its relative frontage or bounds upon that part of the street improved.

9th. The court further erred, after having erroneously construed the statute as prescribing that so much of the assessment should be apportioned to and assessed upon each parcel of land fronting or bounding on the improvement as should be in the same proportion to the entire expense as its frontage upon the improvement was to the entire frontage, in holding and deciding that by reason thereof the statute was void, whereas the court should have held that the

legislature of the State of New York under the constitution of that State had power and capacity to ascertain, adopt, and prescribe such method of apportionment as in its judgment would best result in apportioning to and assessing upon each lot or parcel of land that part of the expense which was justly its share because of the benefit which the improvement conferred upon it; that it must be presumed, in the absence of evidence to the contrary, that this rule was prescribed after proper deliberations and a * * * prior determina-
90 tion that it would best result in apportioning the expense of the improvement in proportion to the benefits which the improvement conferred.

10th. The court erred in holding and deciding that the proper parties were before the court in this suit, whereas the court should have held and decided that all persons within the jurisdiction of the court whose property is included in said assessment-roll should be parties to this suit, and that the owners of the bonds which had been issued and sold under the statutes referred to should be made parties to this suit, as the rights and interests of said other owners of real estate and bondholders are necessarily affected by the decree in this suit and are united in interest with the complainant in the subject-matter thereof.

11th. The court erred in holding and deciding that the Columbia Land Company, the complainant's predecessor in title, by signing the petition for and consenting to the said improvement and assessment did not waive its right to aver or claim that said statutes or either of them were unconstitutional or void, and that the complainant was not also estopped, whereas the court should have held and decided that the Columbia Land Company by petitioning for and consenting to the action by the town board under said statutes waived their right to insist or aver that the statutes, or either of them, were unconstitutional, and should have held that the complainant, being a successor in title, is also barred and precluded for the reason aforesaid.

12th. The court erred in holding and deciding that the complainant was not estopped from questioning the validity of the
91 statutes aforesaid or of either of them, whereas the court should have held and decided that the holder of the mortgage upon the lands described in the complaint and upon the foreclosure of which the complainant took title was estopped and precluded by the action of the owner of the equity of redemption in petitioning for and consenting to the improvement and by his own negligence and laches in acquiescing in the making of the improvement and in not taking any of the proceedings at law which the laws of the State of New York afforded to correct the proceedings or prevent the making of the improvement, the incurring of the expense, or the issuing of the bonds, and that the complainant, as a successor in title to the owner of the equity of redemption and the owner of the mortgage, is also estopped and precluded by said affirmative action in petitioning for and consenting to and in the acquiescence in the proceedings and improvement, as aforesaid.

Wherefore the said The Town of Tonawanda and John K. Patton,

supervisor of the town of Tonawanda, jointly and severally, pray that the final decree of the circuit court of the United States for the northern district of New York aforesaid be reversed, and that the said court be directed to grant and enter a decree dismissing the bill of complaint in this suit upon the merits and awarding to these defendants their costs and disbursements in that behalf most wrongfully sustained.

JOHN CUNNEEN,
Solicitor for the Appellants and Defendants,
85 *West Eagle Street, Buffalo, N. Y.*

Indorsed: Assignment of errors. Filed January 17, 1900. W. S. Doolittle, clerk.

92 *Petition for Appeal.*

United States Circuit Court, Northern District of New York.

THE TOWN OF TONAWANDA, IN ERIE County, and John K. Patton, Supervisor of the Town of Tonawanda, Plaintiffs, Appellants,
vs.
JAMES B. LYON, Defendant, Respondent. } In Equity. No. 6778.

The above-named Town of Tonawanda and John K. Patton, supervisor, conceiving themselves aggrieved by the decree rendered on the 17th day of January, 1900, in the above-entitled suit, do, jointly and severally, hereby appeal from said decree to the Supreme Court of the United States, and they and each of them pray that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated January 17th, 1900.

JOHN CUNNEEN,
Solicitor for Plaintiffs, Appellants,
85 *West Eagle Street, Buffalo, N. Y.*

And now, to wit, on January 17th, 1900, it is ordered that the appeal be allowed as prayed for.

ALFRED C. COXE, *U. S. J.*

93 UNITED STATES OF AMERICA, *Northern District of New York,* } *ss:*

To James B. Lyon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and taken in a certain suit in the United States circuit court for said district, wherein The Town of Tonawanda, New York, and John K. Patton, supervisor of said town, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the decree rendered against

the said plaintiffs in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of Albany, in said northern district, on the 17 day of January, one thousand nine hundred.

ALFRED C. COXE.

I hereby admit due personal service of the foregoing citation. January 17, 1900.

ROBERTS, BECKER, MESSER & GROAT,
Solicitors for James B. Lyon, Defendant in Error.

94 [Endorsed:] 6778. U. S. circuit court, northern district of New York. The Town of Tonawanda, in Erie County, and one, plaintiffs, appellants, *vs.* James B. Lyon, defendant, respondent. Original. Petition for appeal, allowance, citation, and admission of service. John Cunneen, solicitor for plaintiffs, appellants; office and P. O. address, 85 West Eagle street, Buffalo, N. Y. In equity. No. 6778. U. S. circuit court, N. D. of N. Y. Filed Jan. 17, 1900. W. S. Doolittle, clerk. D. C.

95 UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 94, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James B. Lyon *vs.* The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the northern district of New York, in the second circuit, this ninth day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal of the U. S. Circuit Court, Northern District, N. Y.]

W. S. DOOLITTLE, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 2, 9, 1900. W. S. D.]

Endorsed on cover: File No. 17,657. N. New York C. C. U. S. Term No., 214. The Town of Tonawanda, New York, and John K. Patton, supervisor of said town, appellants, *vs.* James B. Lyon. Filed February 27, 1900.